

**OPINION**  
**66-342**

August 11, 1966 (OPINION)

Mr. Robert Vaaler, Attorney

Grand Forks County Drainage District

Grand Forks, North Dakota

RE: Waters - Drains - Highways

This is in response to your letter of August 4, 1966, requesting our opinion relative to the relationship of section 61-21-31 of the North Dakota Century Code and article 56 of the constitution of North Dakota.

Briefly, the facts, as contained in your letter, are as follows: The Grand Forks County Board of Drainage Commissioners established Grand Forks County Legal Drain No. 13a pursuant to chapter 61-21 of the North Dakota Century Code. Drain 13a crosses U. S. Highway No. 81 and the state highway department, pursuant to section 61-21-31, was notified and requested to provide an opening through such highway. The state highway department refused, stating that such drain did not meet certain standards specified by the department's administrative policy memorandum no. 811-1 which states, in part, "The state highway department will participate in the cost of any drainage facility only to the extent that the highway is benefited by the construction of such drainage facility." The state highway department bases administrative memorandum no. 811.1 on its interpretation of article 56 of the constitution of North Dakota.

Section 61-21-31, insofar as it applies to this situation, reads as follows:

"In instances where it shall be necessary to run a drain across such highway, the state highway department, \* \* \* when notified by the board to do so, shall make necessary openings through such road or highway, and shall build and keep in repair all suitable culverts or bridges at its own expense, as provided under the applicable provisions of section 61-21-32. \* \* \*."

Article 56 of the constitution of North Dakota, insofar as it applies to this situation, reads as follows:

"Revenue from gasoline and other motor fuel excise and license taxation, motor vehicle registration and license taxes, \* \* \* shall be appropriated and used solely for construction, reconstruction, repair and maintenance of public highways, and the payment of obligations incurred in the construction, reconstruction, repair and maintenance of public highways."

The primary issue to be considered is whether or not the expenditure of funds by the state highway department for an opening through a highway for drain purposes, pursuant to section 61-21-31, would contravene the intent of article 56 of the constitution of North

Dakota. The intent of article 56 is clearly stated in McKenzie County v. Lamb, 70 N.D. 782, 298 N.W. 241, as being "to prevent any use of the gas revenues for other than highway purposes." The "necessary openings" or "suitable culverts or bridges" required by section 61-21-31 are that part of a highway which will allow motor vehicles to pass over a legal drain and remain on such highway. Section 61-21-31 does not purport to require the state highway department to financially participate in the construction of the drain itself but merely is a means which will allow traffic using such highway to continue on its journey across the drain.

The necessity of such an opening as decided by the board of drainage commissioners cannot be questioned. The North Dakota Supreme Court, in Bergen Township v. Nelson County, 33 N.D. 247, 156 N.W. 559, although confronted with a different factual situation, held that "when the board of drain commissioners have, in all things, proceeded in accordance with the statutory requirements, their action is final, and the courts will not inquire into the correctness of their determination upon questions within their jurisdiction, unless such determination is assailed for fraud, or other ground for equitable interference."

It is noted that section 61-21-31 states, in part, that the state highway department "\* \* \* shall make necessary openings \* \* \*." (Emphasis supplied) It is generally agreed that the word "shall" is mandatory and imperative rather than directory and does not allow discretionary action (State v. Hanson, 210 Iowa 773, 231 N.W. 428, 430; State v. Dilworth, 80 Mont. 102, 258 P. 246, 248). Section 1-02-02 of the North Dakota Century Code states, in part, "Words used in any statute are to be understood in their ordinary sense, unless a contrary intention plainly appears, \* \* \*." In defining the word "shall", Webster's Seventh New Collegiate Dictionary indicates it is "used in laws, regulations, or directives to express what is mandatory. \* \* \*."

It is our opinion, therefore, based on the foregoing, that the word "shall", as used in section 61-21-31, is mandatory as no contrary intention is apparent and that such section of the North Dakota Century Code is not contrary to the intention of article 56 of the constitution of North Dakota as openings through any public road or highway determined necessary by a board of drainage commissioners are clearly for highway purposes.

It should be noted that we have not herein considered the constitutional question which may be involved. All laws or statutes are presumed to be constitutional and it takes four-fifths of the members of the Supreme Court to declare a statute unconstitutional.

HELGI JOHANNESON

Attorney General